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Supreme Court of the United States

OCTOBER TERM, 1929

No. 485

GABRIEL TOOMBS, Appellant

vs.

CITIZENS BANK OF WAYNESBORO

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR APPELLEE

(34,616)

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STATEMENT OF THE CASE

The Citizens Bank of Waynesboro became insolvent on or about August 16, 1926, and its affairs were surrendered to the Superintendent of Banks for the State of Georgia for liquidation. Subsequent to the failure of the bank certain of its depositors reduced their claims in an amount sufficient to leave the deficit equal to amount of the required capital. The stockholders determined to reopen the bank and at a legal and duly called meeting levied an assessment of 100% of the face value of the stock to make good the impairment of the capital. The appellant was a stockholder and refused to pay the assessment so levied. The bank brought suit against him and the court rendered judgment in favor of the bank. Appellant appeals from judgment of Supreme Court affirming trial court. Reported in 149 S. E. 645.

THE ERRORS ASSIGNED

In the statement of points to be relied upon, appellant insists that §§ 1, 2 and 3 of Article VI of the Georgia Banking Law denies him due process of law because under those sections no provision is made for notice to the stockholders of the special meeting at which the assessment is levied.

THE SECTIONS UNDER ATTACK

§§1, 2 and 3 of Article VI of the Georgia Banking Act of 1919, as amended by the Act of 1925, which appellant insists denies him due process of law, are quoted in full in the margin.*

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*"Whenever the Superintendent of Banks shall find that the capital stock of any bank has become impaired or reduced as much as ten per cent. of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced within sixty (60) days, by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made, provided that such bank may reduce its capital to the extent of

the impairment if such reduction will not place its capital below the amount required by this Act. At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present."

§ 2366 (48), *Michie's Code.*

"If any stockholder should refuse or neglect to pay any assessment which may be levied by the special stockholders' meeting for the purpose of making good any impairment or reduction of capital within thirty (30) days after such assessment shall have been levied, the directors of such bank shall have the right to sell to the highest bidder, at public outcry, for cash, a sufficient amount of the stock of such stockholder to cover the assessment after giving previous notice of such sale once a week, for two (2) weeks, in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published. In the event said stock is sold for less than the amount of the assessment upon same and necessary costs of sale, the bank shall have the right to sue such stockholder for the difference between the amount of the assessment and the proceeds of the sale. Out of the proceeds of the sale of said stock, the directors shall pay the necessary costs of sale and the amount of the assessment called for thereon, and the balance, if any, shall be paid to the person or persons whose stock has been sold, or to the holder of the certificate therefor upon the surrender of such certificate. A sale of the stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the same null and void, and the rights of any and all stockholders thereof shall terminate and a new certificate or certificates, shall be issued to the purchaser or purchasers of such stock, free from all liens, or claims, whatsoever. The bank shall, in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment so levied, in lieu of the sale of such stock and at the option of the bank."

§ 2366 (49), *Michie's Code.*

"When any stockholder shall have pledged or hypothecated his stock, and the title thereto by reason of insolvency or other legal process, has been acquired by the pledgee, the bank shall have the right to notify the pledgee to cause said stock to be transferred upon the books of the banks, and upon failure of said stockholder to present said stock to the bank for the purpose of having same transferred, thereon within six months after the receipt of such notice, then the bank shall cause the same to be sold in the same manner as Sheriff's sales are now held. A sale of said stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the same null and void, and the rights of the holder or holders thereof shall terminate and a new certificate or certificates shall be issued to the purchaser of said stock free from all liens or claims whatsoever. The proceeds of said sale shall be first applied to the expenses of the bank in making said sale, and the remainder, if any, shall be paid to the pledgee."

§§ 2366 (50½), *Michie's Code.*

BRIEF OF THE ARGUMENT

I.

THE ORIGINAL SECTION PROVIDING FOR ASSESSMENT TO RESTORE IMPAIRED CAPITAL.

The first general statute in the State of Georgia providing for assessments to restore impaired capital of banks was enacted December 16, 1895. It provided:

> "When the bank examiner or assistant bank examiner finds that the capital stock of any bank chartered under the laws of this state has become impaired or reduced from losses or any other source, the bank examiner shall require such bank to make good its capital stock, so impaired or reduced, by a transfer from its surplus or undivided profits * * * to the capital stock (of) a sum sufficient to make good such impairment or reduction, and if there is no surplus or undivided profits or not enough to make good said capital stock, then by an assessment upon the stockholders thereof."

Acts 1895, *p.* 58, § 1; *Civil Code* 1895, § 1926.

This statute was enacted prior to the grant of the charter of the Citizens Bank of Waynesboro.

The liability of stockholders to restore impaired capital stock was continued in subsequent acts regulating banks and banking in this State.

Acts 1907, *p.* 85; § 2291. *Park's Ann. Code* 1914.

This section is quoted in full in the margin.*

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*"Whenever it shall appear that the capital stock of any bank or trust company doing business under this law has been impaired over ten per cent., the State bank examiner shall notify such bank to make such impairment good within ninety days, and it shall be the duty of the officers and directors of any bank receiving such notice from the State bank examiner to immediately call a special meeting of its stockholders for the purpose of making assessment on its stock, sufficient to cover the impairment of its capital, payable in cash: Provided, that such bank may reduce its capital to the extent of the impairment, if such reduction will not place its capital below the amount required by this law."

§ 2291, *Park's Ann. Code*, 1914.

II.

STOCKHOLDERS GIVEN ADEQUATE REMEDY TO CONTEST THEIR LIABILITY.

There is nothing in the sections under attack that denies stockholders due process of law. §1 of Article VI of the Banking Act (§2366(48) Michie's Code) provides that the Superintendent of Banks shall determine the extent to which the capital stock of a bank has become impaired. It then becomes necessary for the bank to call a special meeting of its stockholders to determine whether or not the capital stock shall be restored or its assets and affairs surrendered to the Superintendent of Banks for liquidation. Stockholders necessarily are notified of the special meeting. Record discloses appellant was notified of meeting at which assessment sought to be enforced was levied. (R. 15, 16).

Even though under this section the Superintendent of Banks is authorized to determine the amount of assessment necessary to restore impaired capital stock, it does not deprive stockholders of due process of law. The bank's stockholders are its managers for the purpose of determining whether or not it shall continue to operate or liquidate. Necessarily some provision of law must be made for the handling of such situations.

The sections under attack are similar to

R. S. § 5205; *Title* 12, § 55, *U. S. Code.*

Mr. Justice Day, speaking for this Court, said of this section.

> "The assessment ordered by the comptroller was for the purpose of restoring the capital of the bank, and thus enabling it to continue its business. Ample power is conferred upon the comptroller for this purpose."
>
> *Commercial Natl. Bank v. Weinhard*, 192 *U. S.* 243, 247.

The method chosen to enforce the liability of appellant was by suit. He had every opportunity to appear and defend; if any of the proceedings were irregular or if the assessment was improvidently levied he had every opportunity to be heard before the issues were decided.

Appellant by becoming stockholder assumed the liability sought to be enforced.

Coffin Bros. v. Bennett, 277 *U. S.* 29.

III.

FORMS OF PROCEDURE IN STATE COURTS ARE NOT CONTROLLED BY THE 14TH AMENDMENT.

This court has said:

> "The 14th Amendment to the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard, before the issues are decided."

Iowa Central R. Co. v. Iowa, 160 *U. S.* 389 (*h. n.*).

Similar language was used in:

Louisville, etc. R. Co. v. Schmidt, 177 *U. S.* 230.

And in:

Brown v. New Jersey, 175 *U. S.*, 172.

The fundamental requirement of "due process" is an opportunity for hearing and defense.

Ballard v. Hunter, 204 *U. S.* 241.

> "The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied the court is governed by the substance of things, not by mere form."

Simon v. Craft, 182 *U. S.*, 427.

"Due Process" is afforded if at any stage of the proceeding before final judgment an opportunity to defend is given.

Hager v. Reclamation Dist. 111 *U. S.* 701.

> "It is scarcely necessary to say that this court when asked to review proceedings in state courts have always held that due process of law is afforded litigants if they have opportunity to be heard at any time before final judgment is entered."

Wilson v. Standefer, 184 *U. S.* 399, 415.

The court, speaking through Mr. Justice Stone, seems to have stated the whole law in a single paragraph. It was there said:

> "It has been so often pointed out in the opinions of this court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Missouri Ex rel. Hurwitz v. North, 271 *U. S.* 40.

See also:

Coffin Bros. v. Bennett, 277 *U. S.* 29.

Appellant in his brief makes some reference to the remedial legislation which provides the machinery for enforcing voluntary assessments. He contends that such legislation impairs the obligations of contracts. There is no assignment of error on this point. We, therefore, deem it unnecessary to enter into any discussion of the subject.

We respectfully submit that the sections of the Banking Law under attack do not deprive the appellant of his property without due process of law contrary to the guarantee of the Fourteenth Amendment.

Respectively submitted,

CARL N. DAVIE,

EARL NORMAN,

Solicitors for Appellee.